

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

GARY DEE BICE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:11CV27 SNLJ
	)	
COMMISSION OR DIRECTORS OF	)	
CAPE GIRARDEAU CITY POLICE	)	
DEPARTMENT, et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM AND ORDER**

This matter is before the Court upon the motion of Gary Bice, an inmate at Stoddard County Jail, for leave to commence this action without payment of the required filing fee [Doc. #2]. The Court finds that plaintiff does not have sufficient funds to pay the entire filing fee and will assess an initial partial filing fee of \$1.00.<sup>1</sup> Furthermore, based upon a review of the complaint, the Court finds that the complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

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<sup>1</sup>Plaintiff was unable to procure a copy of his trust account statement. However, he requests that the Court let him make an initial payment. See Doc. #3. Consequently, the Court will assess the initial partial filing fee of \$1.00.

## **28 U.S.C. § 1915(e)**

Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court must dismiss a complaint filed in forma pauperis if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. An action is frivolous if it “lacks an arguable basis in either law or fact.” Neitzke v. Williams, 490 U.S. 319, 328 (1989); Denton v. Hernandez, 504 U.S. 25, 31 (1992). An action is malicious if it is undertaken for the purpose of harassing the named defendants and not for the purpose of vindicating a cognizable right. Spencer v. Rhodes, 656 F. Supp. 458, 461-63 (E.D.N.C. 1987), aff’d 826 F.2d 1059 (4th Cir. 1987). A complaint fails to state a claim if it does not plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

## **The Complaint**

Plaintiff brings this action under 42 U.S.C. § 1983. Named as defendants are the Commission or Directors of Cape Girardeau City Police Department, Unknown Estes (Detective), and Unknown Jenson (Police Officer).

Plaintiff alleges that in December 2009 defendants Estes and Jenson, along with other police officers, broke into his home and used excessive force in

effectuating his arrest. Plaintiff says that Jenson kicked him in the testicles, and plaintiff claims that he was further beaten in an elevator. Plaintiff maintains that he was not taken to the hospital until five days later. Plaintiff avers that he lost one testicle as a result of the beating and that he required surgery. Plaintiff seeks compensation of his medical bills and further monetary relief.

### **Discussion**

The allegations in the complaint are duplicative of the allegations plaintiff brought in the case Bice v. Ester, 1:10CV93 SNLJ (E.D. Mo.), which the Court dismissed pursuant to 28 U.S.C. § 1915(e). As a result, the complaint will be dismissed as duplicative. E.g., Cooper v. Delo, 997 F.2d 376, 377 (8th Cir. 1993) (§ 1915(e) dismissal has res judicata effect on future IFP petitions).

Furthermore, Plaintiff's claim against the Commission or Directors of Cape Girardeau City Police Department is legally frivolous because this defendant is not a suable entity. Ketchum v. City of West Memphis, Ark., 974 F.2d 81, 81 (8th Cir. 1992) (departments or subdivisions of local government are "not juridical entities suable as such.").

Finally, the complaint is silent as to whether the individual defendants are being sued in their official or individual capacities. Where a "complaint is silent

about the capacity in which [plaintiff] is suing defendant, [a district court must] interpret the complaint as including only official-capacity claims.” Egerdahl v. Hibbing Community College, 72 F.3d 615, 619 (8th Cir. 1995); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989). Naming a government official in his or her official capacity is the equivalent of naming the government entity that employs the official. Will v. Michigan Dep’t of State Police, 491 U.S. 58, 71 (1989). To state a claim against a municipality or a government official in his or her official capacity, plaintiff must allege that a policy or custom of the government entity is responsible for the alleged constitutional violation. Monell v. Dep’t of Social Services, 436 U.S. 658, 690-91 (1978). The instant complaint does not contain any allegations that a policy or custom of a government entity was responsible for the alleged violations of plaintiff’s constitutional rights. As a result, the complaint fails to state a claim upon which relief can be granted as to the individual defendants.

Accordingly,

**IT IS HEREBY ORDERED** that plaintiff’s motion to proceed in forma pauperis [Doc. #2] is **GRANTED**.

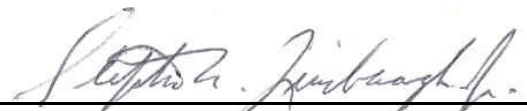
**IT IS FURTHER ORDERED** that the plaintiff shall pay an initial filing fee of \$1.00 within thirty (30) days of the date of this Order. Plaintiff is instructed to

make his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

**IT IS FURTHER ORDERED** that the Clerk shall not issue process or cause process to issue upon the complaint because the complaint is legally frivolous or fails to state a claim upon which relief can be granted, or both.

An Order of Dismissal will accompany this Memorandum and Order.

Dated this 25th day of February, 2011.



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STEPHEN N. LIMBAUGH, JR.  
UNITED STATES DISTRICT JUDGE